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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

IN RE:

WALTER FEINSTEIN, JASON I. GREEN, JACK KRIEGSMAN, LEO MILLER, and MORTON H. PASTOR,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

May a district court, sitting on an action which is thirteen years old, consistently refuse to determine by order whether the action is to be determined as a class action, and consistently refuse to either try the action or enter judgment so that an appeal might be prosecuted?

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Petitioners respectfully pray that a writ of mandamus issue directing the Honorable William Matthew Byrne, Jr., District Judge, United States District Court for the Central District of California, to set a date certain for the commencement of jury trial and to determine by order whether this action is to be maintained as a class action. In the alternative, petitioners pray that a writ of mandamus issue directing the said Honorable William Matthew Byrne, Jr. to enter judgment so that an appeal may be prosecuted.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1651 which provides:

> "The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

PROVISIONS OF LAW INVOLVED

Rule 1, Federal Rules of Civil Procedure

> *"Rule 1. Scope of Rules*
>
> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 23(c)(1), Federal Rules of Civil Procedure

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

STATEMENT OF THE CASE

1. This is a private antitrust suit filed by five individual physicians on behalf of a class of physicians doing business in Southern California. The action was brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 25, to recover damages for and to secure injunctive relief against

defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1]

2. The complaint was filed on November 13, 1969. On January 10, 1970, plaintiffs timely filed their motion pursuant to Rule 23 of the Federal Rules of Civil Procedure for class determination. By March 30, 1970, all defendants had filed answers for the most part denying the material allegations of the complaint and asserting affirmatively that the action was, as a matter of law, barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1015.

3. On September 1, 1970, defendants jointly moved the district court, on the basis of the *McCarran Act*, for partial summary judgment [dismissal] of all claims asserted in the complaint except "those based upon allegations of boycott, coercion or intimidation." Eleven months later, on August 2, 1971, the district court entered its order granting defendants' motion. In doing so, the district court held that, *as a matter of law*, the willful creation and maintenance of a monopoly in the insurance industry was exempt from prosecution under the federal antitrust laws; and held that agreements to fix prices for insurance were likewise exempt—even though such agreements were strictly condemned by applicable state law, and notwithstanding that the price fixing agreements had admittedly been effectuated by boycott and coercion. At the same time the district court denied plaintiffs' Rule 23 motion without prejudice.

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[1]The parties defendant are: Nettleship Company of Los Angeles; Pacific Indemnity Company; Insurance Company of North America; Hardware Mutual Casualty Company; American Re-Insurance Company and North American Re-Insurance Corporation.

4. On January 10, 1972, the district court denied plaintiffs' alternative motion for reconsideration, entry of judgment pursuant to F.R.Civ.P. Rule 54(b) or certification pursuant to 28 U.S.C. § 1292(b). On December 11, 1973, defendant Nettleship dismissed its ten million dollar counterclaim against the named plaintiffs.

5. On July 25, 1974, plaintiffs again moved for class determination. The motion was denied by the district court without opinion in its minute order of December 9, 1974. Since the order of December 9, 1974 did not indicate the grounds for denial or state that the denial was with prejudice, plaintiffs, in order to perhaps more clearly comply with Local Rule 3(k) of the Rules of the United States District Court for the Central District of California, renewed their motion for class action determination on May 15, 1975, and, in connection therewith, provided the district court with a proper certified statement and affidavit of counsel showing the court the new and different facts upon which said motion was predicated, all of which had developed since the court's order of August 2, 1971 denying plaintiffs' Rule 23 motion without prejudice.

6. On March 25, 1974 discovery in this action closed pursuant to order of the district court. By December, 1974, plaintiffs had successfully resisted the last of defendants' procedural motions to dismiss, and announced ready for trial.

7. On June 9, 1975, fifteen months after discovery had been ordered closed, defendants filed their joint motion for summary judgment [dismissal] on all remaining issues. The

motion was taken under submission by the district court on June 26, 1975.

8. *Twenty-six months after submission* of defendants' joint motion for summary judgment, on August 31, 1977, the district court entered its opinion and order granting defendants' motion to dismiss the boycott, coercion and intimidation claims alleged in the complaint. The district court declined to rule on plaintiffs' motion for class action determination, stating, "In light of this dismissal, it is unnecessary to consider plaintiffs' motion to have the action maintained as a class action."

9. On September 28, 1977, petitioners timely filed their notice of appeal from the district court's judgment of August 31, 1977, and the orders of August 2, 1971 and August 24, 1977. On appeal, petitioners presented various questions of law for appellate determination, including, *inter alia*, the following:

> "Is the willful creation and maintenance of an insurance monopoly exempt from prosecution under the federal Antitrust laws?"
>
> "Are secret agreements between an insurance company and a medical association which require that in the absence of approval by the association, the insurance company refuse to sell policies of medical malpractice insurance to otherwise qualified physicians, immunized from prosecution as constituting an unreasonable restraint on the business of medicine and the business of insurance in violation of the Sherman Act, when it is admitted that the insurance company controls 98% of the medical malpractice insurance market in question; where it is established that medical malpractice insurance is a business necessity for physi-

cians; where said agreements are entered into for the purpose of allowing the association to control prices charged by individual physicians for medical services and where the agreements have the effect of creating and maintaining an insurance monopoly?"

"Are secret agreements between insurance companies to fix and control rates charged for insurance exempt from prosecution under the federal antitrust laws where such agreements are specifically prohibited by the law of the state in which they are made effective?"

10. On November 7, 1979 the court of appeals acted on its own motion to forestall determination of the questions presented on appeal and properly before it, and remanded the case to the district court "for reconsideration for a period of ninety-one days" [Appendix A].

11. After remand defendants below did nothing for over 60 days. Finally, on January 15, 1980, defendants filed a joint motion for "reaffirmance" of summary judgment with the district court.

12. On January 28, 1980, the court of appeals on its own motion and without notice extended remand for an additional 63 days [Appendix B].

13. On March 28, 1980, the district court filed a memorandum of opinion and order and, as pertinent, stated:

"This action is here on remand from the Ninth Circuit Court of Appeals by Order filed November 7, 1979. Pursuant to the Order of Remand, the Court hereby

vacates its entry on August 31, 1977 of partial summary judgment in favor of defendants . . .

• • • •

"The Court notes that this vacation of its judgment entered August 31, 1977 in no way disturbs its entry [sic] *on August 2, 1971 of partial summary judgment in favor of defendants as to* [certain of] *plaintiffs' claims* . . . Despite plaintiffs' purported appeal from the August 2, 1971 judgment via the filing of a nontimely notice of appeal on September 28, 1977, the [district] Court considers those issues decided therein as being finally determined and undisturbed by the Ninth Circuit's Order of Remand. The Order of Remand simply furnishes no basis for the conclusion that the matters resolved in the August 2, 1971 Order have now been thrown open for reconsideration. Furthermore, *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 2923 (1978), *provides no ground upon which plaintiffs may renew their class of claims relating to price-fixing and monopolization.*

• • • •

". . . the Court hereby requests the Ninth Circuit, upon receipt of this Order, to extend the period of remand for *sixty days from the date of receipt.*" (emphasis added).

14. On April 8, 1980, plaintiffs filed their request for an immediate hearing on appeal with the court of appeals and, in support thereof, recited in part as follows:

"In its Order of March 28, 1980, the District Court vacated its Order of August 31, 1977 granting partial summary judgment in favor of defendants-appellees and reaffirmed and did not "disturb" its Order of August 21, 1971 granting partial summary judgment in favor of defendants.

"At the hearing held on November 7, 1979, this Court specified that the entire action, including both Orders of Dismissal entered by the District Court, would be remanded to the District Court for reconsideration by the District Court in light of the decision of the Supreme Court in *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 2923 (1978), 54 L.Ed. 275 and so that the District Court might consider the contention of defendants-appellees that Orders of Dismissals were appropriate notwithstanding the decision in *St. Paul, supra.* [*Order*, November 7, 1980]

"The District Court has, in its Order of March 28, 1980, refused the invitation of this Court to review and/or reconsider its August 2, 1971 Order Granting Partial Summary Judgment in favor of defendants. The August 2, 1971 Order became a final and appealable Order on August 31, 1977, at which time the Court entered its final Order of Dismissal of the action. [Federal Rules of Civil Procedure, Rule 54(b)]. Appellants filed a timely Notice of Appeal from both the August 2, 1971 and August 31, 1977 Orders with this Court on September 28, 1977. A copy of said Notice of Appeal is attached hereto as Exhibit D.

"It has now been over ten years since appellants filed their complaint in the District Court. There has yet to be a trial. Defendants-Appellees have been granted three distinct and separate opportunities after the close of discovery to file a properly supported motion for summary judgment. They have yet to do so.

"In any event, the District Court has now directly stated that it has refused to reconsider or vacate

its August 2 1971 Order Granting Partial Summary Judgment in favor of defendants. The August 2, 1971 Order is final; an appeal therefrom has been properly taken and briefed to this Court; and the District Court will take no further action respecting the propriety of said Order. The August 2, 1971 Order involves only legal issues as to whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013, exempts admitted monopoly and agreements to fix prices effectuated by boycott, coercion and intimidation from prosecution under the Sherman Act, 15 U.S.C. §§ 1, 2."

15. On May 20, 1980, the court of appeals filed its order denying the April 8, 1980 motion for an immediate hearing and said:

"The motion of plaintiffs-appellants Walter Feinstein, et al., for an immediate hearing by this Court, is denied." [Appendix C].

16. On June 19, 1980, the court of appeals extended remand for more than double the time requested by the district court on March 28, 1980, and stated:

"The remand to the district court is hereby extended by a period of 91 days from the date of the filing of this Order." [Appendix D].

17. Finally, on August 11, 1980, and within the period of remand, the district court filed its order granting in part and denying in part defendants' January 15, 1980 Motion for reaffirmance of summary judgment and, as pertinent here, stated:

"The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and

good cause appearing therefor, hereby ORDERS that defendants' motion for reaffirmance of summary judgment is DENIED, except as to the following issue: 'Whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants.'"

18. In September, 1980, plaintiffs renoticed their May 15, 1975 Rule 23 motion for certification as a class action. The district court filed its notice of pre-trial conference and set pre-trial for November 3, 1980. On October 29, 1980, after completion by counsel of all pre-trial procedures contemplated by Local Rule 9 of the United States District Court for the Central District of California, counsel for the parties lodged their joint pre-trial conference order in the district court. After full briefing, petitioners' 1975 motion for class certification was taken under submission on October 27, 1980.

19. On November 3, 1980, the parties appeared for ruling on the class action motion and for pre-trial proceedings pursuant to the district court's order of September 2, 1980. Respecting petitioners' May 15, 1975, motion for class action certification, previously taken under submission by the district court on October 27, 1980 the district court announced:

> "THE COURT: Well, I suppose at long last the Court is faced with the necessity of giving its final and last ruling on the motion to certify under Rule 23, and it does appear to the Court that from the posture of the case it is appropriate to certify for class action treatment.

"Well, the Court makes all the usual findings as to the predominance of common issues and as to the appropriateness of making disposition by virtue of class action treatment.

"And it appears that the class should be defined as those Los Angeles physicians who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

"Other than what has been articulated, or expressed, in the past in regard to class action certification, or all other considerations under Rule 23, is there anything further to be added either in support of application for class action certification or in opposition thereto?

"Very well. The order will be as just articulated by the court."

20. On February 2, 1981, the parties again appeared before the district court and the court again addressed the question of class certification:

"We are probably at the point in this case where the Court should make its order certifying the class. . . .

"The aspect of the case which perhaps presents some confusion is whether the likely evidence in intimidation looks like price-fixing evidence, and it probably will look like price-fixing evidence, but it seems to the Court that it is, nevertheless, evidence that comes into the case if only, and not only on the issue of damages, but with respect to the class which the Court contemplates certifying, and that is, those Los Angeles physicians and surgeons who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

"The Court is satisfied that there are the necessary circumstances of numerosity, common questions of law and fact, typically, adequacy of representation—all of those things seem to be present so far as it is necessary for the Court to make a finding to that effect.

"And that is, that those matters predominate over the separate issues, and the Court makes such a finding."

21. In late March and early April, 1981, defendants below *again* filed motions for summary judgment, those motions were based on the same facts and law previously rejected by the district court in connection with its August 11, 1980 denial of summary judgment. By May 27, 1981, plaintiffs had served and filed their oppositions to each said motion and had requested sanctions pursuant to F.R.Civ. P. Rule 56(g).

22. On May 20, 1981, the Honorable Robert J. Kelleher, District Judge, recused himself *sua sponte* on the ground that his son had "joined the law firm of Gibson, Dunn & Crutcher, which is involved in this matter."

23. On May 29, 1981, this case was assigned to the Honorable William Matthew Byrne, Jr., District Judge, pursuant to 28 U.S.C. § 137.

24. On June 19, 1981, the District Court found that, notwithstanding the rulings made by Judge Kelleher on November 3, 1981 and February 2, 1981, petitioners' May 19, 1975 motion for class certification was "still pending." At the same time, the District Court found, *sua sponte,* that remand had "expired"; overruled petitioners' objections to further delay; and ordered that petitioners join in a request for a further extension of remand.

25. On July 8, 1981, plaintiffs filed their petition for writ of mandamus to the Honorable William Matthew Byrne, Jr., United States District Court, Central District of California, and for Other Relief [No. 81-7434], and asked that the court of appeals enter certain orders and grant certain relief as follows:

"To: Circuit Judges Chambers, Anderson and Schroeder:

"Petitioners hereby petition this Honorable Court for a Writ of Mandamus directing the Honorable William Matthew Byrne, Jr., to:

"1. Set a trial date;

"2. Reconsider and either vacate or affirm the Order of August 2, 1971 granting defendants' Motion for Partial Summary Judgment;

"3. Enter a written order granting petitioners' May 15, 1975 Motion for Class Certification.

"In the alternative, petitioners respectfully request that, pursuant to the appeal pending before this Court in No. 77-3998, and the November 7, 1979 Order of Remand entered therein, this Court itself schedule an immediate hearing so that the following matters might be considered:

"1. Whether this Court should now act to consider and either reverse or affirm the District Court's Order of August 2, 1971 granting partial summary judgment in favor of defendants.

"2. Whether this Court should now act to clarify the scope and extent of its November 7, 1979 Order of Remand for the guidance of the District Court and the parties below.

"3. Whether this Court should now itself act to establish a date by which the District Court must rule

on petitioners' May 19, 1975 Motion for Class Action Certification.

"4. Whether this Court should now itself act to specify a date certain for the commencement of jury trial in the District Court."

26. On or about July 20, 1981, defendants below filed what they styled as a "Joint Request of the Parties for Extension of Remand." Plaintiffs' "joinder" in said request was commanded by the June 19, 1980 instruction and order of the district court.

27. On August 21, 1981, the court of appeals denied petitioners' July 8, 1981 petition for a writ of mandamus and again, over plaintiffs' objection, extended remand for a further period of 120 days. [Appendix E].

28. On December 19, 1981, or, at the latest, December 21, 1981 [*F.R.Civ.P.*, Rule 6], the period of remand extended and provided by court of appeals expired, and the district court was thereafter without jurisdiction over this action.

29. On January 11, 1982, counsel for plaintiffs received a document styled "Civil Minutes-General" dated December 24, 1981 from O'Melveny & Myers which same states:

"Court grants defendants' Motion [sic] for Summary Judgment. Court to issue Memorandum and Findings."

30. On January 29, 1982, plaintiffs filed another petition for writ of mandamus with the court of appeals, noted that the district court had failed to act within the period of remand provided by the order of August 21, 1981; and, asked that the district court be ordered to act. In the alternative, petitioners requested a hearing on and an appellate determination of the monopoly questions decided in the

district court's order of August 2, 1971, and presented in petitioners' original 1977 appeal.

31. On March 2, 1982, the court of appeals denied petitioners' January 29, 1982 petition for writ of mandamus, and, again, on its own motion, extended remand for an additional thirty days. [Appendix F].

32. On April 7, 1982, the district court having continued in its refusal to act, plaintiffs applied to the court of appeals for a writ of mandamus and asked that the district court be ordered to set a date certain for trial.

33. On May 4, 1982, the court of appeals denied plaintiffs' April 7, 1982 petition for writ of mandamus and acted on its own motion to again extend remand for an additional fifty-six days. [Appendix G].

34. Petitioners have to date not been served with or received any "Memorandum and Findings" authored or entered by the district court, nor have they received any notice that the December 24, 1981 "Civil Minutes-General" has been filed. Petitioners have not received any notice that the district court has entered judgment or taken *any* other action in this case. They have simply heard nothing from the respondent district court.

REASONS FOR GRANTING THE WRIT

This case is almost thirteen years old. There has been no trial. There has been no hearing on appeal, nor any appellate affirmation or reversal of the orders of dismissal entered by the district court. Almost five full years have elapsed since judgment was entered. Two and one-half years have gone by since the court of appeals filed its

November, 1979 "ninety-one" day order of remand. Contrary to the requirements of Rule 23 of the Federal Rules of Civil Procedure the respondent district court judge has refused to consider the question of class certification, and has refused to determine whether this action will be maintained as a class action.

The respondent district court has never stated any reason for its continuing refusal to act. The court of appeals has never stated any reason for its continued *sua sponte* extension of remand. In fact, the district court has not since March, 1980—over two years ago—made any request for an extension of remand; nor has it indicated that it requires additional time to properly take action. It may never act. The court of appeals refuses to either order action or set a limit on delay, and itself fails to state any reason for its refusal.

The district court's continued refusal to act and the circuit court's acquiescence in that refusal makes a mockery of justice as it is conceived in these United States. Rule 1 of the Federal Rules has been violated to the point of scandal, and to the point of allowing defendants to emerge from this litigation as winners, notwithstanding any judgment they may eventually be required to pay. Not so with petitioners, several of whom have been forced to retire, and one of whom is, as the district court was long ago advised, in extremely poor health.

This is an extraordinary case, involving continual and indefensible delay and inaction by both the district court and the court of appeals. The writ of mandamus has traditionally been used in the federal courts to compel an in-

ferior court to exercise its authority when it is its duty to do so, *Kerr v. United States District Court*, 426 U.S. 402 (1976); *United States Dept. of Energy v. Crocker*, 629 F.2d 1321 (9th Cir. 1980). Indeed, this Court has specifically found it appropriate to use mandamus to regulate a trial court's schedule, where the trial court's failure to act expeditiously would prejudice an interested party. See *Connor v. Coleman*, 440 U.S. 612 (1979).

Petitioners have a right to be heard. They have a right to either proceed to trial or obtain appellate review.[3] They have effectively been denied each of these rights, and have no remedy except that this Court may grant their petition.

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[3]One question of law involved in this case, *viz*, whether Congress has, through the *McCarran Act*, extended carte blanche to those who unlawfully monopolize the business of insurance, is one of great public importance. Other than the court below, no court has ever held that a private monopoly of the business of insurance is exempt from the federal antitrust laws. The national implications of the monopoly question presented would, especially in view of the district court's continuing refusal to act, and the circuit court's refusal to hear the appeal before it, fully justify issuance of a writ of certiorari to review this case without waiting for judgment to be given by the court of appeals.

CONCLUSION

For the reasons stated, petitioners respectfully request that the writ prayed for herein be granted.

Dated: May 21, 1982

Respectfully submitted,

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(Appendices follow)